In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 884

HARRY SACHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court denying petitioner's motion to dismiss the indictment (R. 75–78) is reported at 139 F. Supp. 853. The opinion of the District Court (R. 64–74) rendered in conjunction with its verdict finding petitioner guilty as charged (a jury having been waived) is reported at 139 F. Supp. 855. The opinion of the Court of Appeals is reported at 240 F. 2d 46 and also appears as Appendix B to the petition for a writ of certiorari (Pet. 64–76).

JURISDICTION

The judgment of the Court of Appeals (see Pet. 63) was entered on January 3, 1957, and a petition

for rehearing was denied on February 6, 1957. By order of Mr. Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to April 5, 1957, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an inquiry by a congressional committee into a subject (the *Matusow* recantations) to which the question of whether petitioner was, or ever had been, a member of the Communist Party was clearly pertinent, petitioner's refusal to answer was a refusal to answer a question "pertinent to the question under inquiry" within the meaning of 2 U. S. C. 192, notwithstanding the fact that the question was explained as being relevant to the consideration of a bill to disqualify members of the Communist Party from practicing law.

2. Whether, even assuming that petitioner's refusal to answer whether he was or ever had been a member of the Communist Party was not a refusal to answer a question "pertinent to the question under inquiry" because of the circumstances stated in the preceding question, his later refusal to answer whether he was or ever had been a member of the Lawyers' Section of the Communist Party (which question was also pertinent to the main subject of inquiry, the *Matusow* recantations) was not a refusal to answer a question "pertinent to the question under inquiry," where the committee, when the latter question was

asked, was certainly concerned with the main subject of inquiry.

3. Whether the indictment is fatally defective in that —

(*a*) it allegedly fails to state that the "question under inquiry" was within the committee's delegated authority (this question is raised for the first time in this Court);

(*b*) it allegedly fails to specify the "question under inquiry" to which the questions which petitioner refused to answer were pertinent (this question was not raised in or passed upon by the Court of Appeals);

(*c*) it fails to aver specifically that the refusals to answer were "willful."

4. Whether the requirement of answers to the question relating to petitioner's membership in the Communist Party violated his rights under the First Amendment.

5. Whether the Resolution (S. Res. 366, 81st Congress) defining the powers of the Senate Internal Security Subcommittee is unconstitutionally vague.

6. Whether the trial court erred in denying a motion for a hearing to determine whether the votes of any of the government employees on the grand jury, of whom there were eleven, were necessary to the return of the indictment, and, if so, further to determine whether the indictment was invalid because government employees are biased as a class in cases involving any aspect of Communism (this question was not raised in or passed upon by the Court of Appeals).

STATUTE AND RESOLUTION INVOLVED

2 U. S. C. 192 (R. S. 102, as amended) provides:

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d sess. (1950) (96 Cong. Rec. 16872) provides in pertinent part:

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.[1]

[1] The resolution was introduced in evidence as G. Ex. 1 (Tr. 17) and its full text is set forth in the printed Record at pages 80–82.

STATEMENT

On December 21, 1955, petitioner was charged in a three-count indictment (R. 2–3), returned in the United States District Court for the District of Columbia, with having refused, in violation of 2 U. S. C. 192 (*supra*, p. 4), to answer three questions, pertinent to the matter under inquiry, put to him by a subcommittee of the Internal Security Subcommittee of the Senate Committee on the Judiciary, *viz.*, whether he then was or ever had been a member of the Communist Party (counts 1 and 2) and whether he then was or ever had been a member of the "lawyers' Section" of that organization (count 3). Petitioner, having waived his right to a trial by jury (Tr. 3–4), was found guilty on all counts and was sentenced generally to six months' imprisonment and to pay a fine of $1,000 (R. 10). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was affirmed.

The pertinent facts may be summarized as follows:

On several occasions during the year 1952, Harvey Matusow appeared as a witness before the Internal Security Subcommittee of the Senate Committee on the Judiciary and gave sworn testimony concerning, among other subjects, the International Union of Mine, Mill and Smelter Workers (R. 100)—subsequently to be described by the Subcommittee as "Communist controlled" (G. Ex. 12, p. 79). In or about February 1955, Matusow publicly recanted this and other testimony given by him in other proceedings, saying that he had "lied when he testified before this subcommittee and on other occasions" (R. 100).

On February 21, 1955 (R. 99), the Subcommittee commenced a series of hearings "to inquire into this whole matter" and to determine whether Matusow "told the truth in his original testimony before us and is now lying when he says that his original testimony was not the truth," or whether "part of what he told us was true and part was untrue," or whether "he never tells the truth by intent" (R. 100).

The Chairman of the Subcommittee, in opening the hearings, announced that the Subcommittee intended to determine whether Matusow might have been influenced, in making his recantations, by considerations of "low personal greed", or whether he had been the "victim of pressure brought by Communists" and others having "a vested interest in concealing the Communist conspiracy" and had "finally broken under this pressure", or whether there might be some other explanation (R. 100).

Petitioner, one of the witnesses called in the inquiry, appeared before the Subcommittee, presided over by Senator McClellan, on April 19, 1955 (R. 11).

Information and reports in the possession of the committee when it called petitioner.—At the time of petitioner's appearance, the committee had in its files "evidence indicative of the fact that this whole matter"—*i. e.*, the *Matusow* recantations—was part of "a conspiracy having as its primary purpose the discrediting of Government witnesses [in prosecutions against members of the Communist Party]" and "the securing of new trials for convicted Communists" (R. 30–31). It was part of this plan, according to the committee's information, that an effort was

to have been made to induce Matusow to execute affidavits recanting testimony previously given by him as a prosecution witness in the criminal trials of *Clinton Jencks* and *Elizabeth Gurley Flynn et al.* (R. 29–30); that, "[a]s a device to get Mr. Matusow to do this," Matusow was "to write a book," the "money to pay for" which was to be "provided through the Mine, Mill and Smelter Workers Union" (R. 30), and that the book was to be published by Cameron & Kahn, a publishing firm whose members were, according to the committee's information, both members of the Communist Party (R. 31–32, 36).

The committee's information further indicated that this plan had already been carried out to the extent that the book had been published (R. 30, 32), that it "contained chapters on the two trials" above referred to (R. 30), and that "[t]he affidavits [had been] prepared" and Matusow had been "induced to sign" them (*ibid.*). The committee further had information that Matusow's affidavit in the *Jencks* case "had been hatched by two attorneys", one of whom was Nathan Witt (*ibid.*); that petitioner "had received the [*Flynn* case] affidavit and certain other papers from Mr. Matusow" for use in applying for new trials for the defendants in that case, in which petitioner was of counsel (R. 31); and that the "entire Matusow proceeding, his recantation, the writing of the book, [and] the whole drive to discredit Government witnesses • • • were all the product of the planning of a group of lawyers within the Communist Party" (R. 33).

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The committee had, in addition, "information respecting Mr. Sacher's connections with Communist and Communist front organizations going back * * * to at least as early as 1937" (R. 14).[3] Among other such associations, the committee had information that petitioner had, in 1950, been present at a "birthday party for Alexander Bittelman", held at the New York headquarters of the Communist Party and "attended only by high functionaries" of the Party (R. 25), and that he had, in 1947, attended a meeting in Boston at the home of Angus Cameron (of the publishing firm which later published Matusow's book), which meeting was also attended by "a known Communist section leader" (R. 36).

The committee further had reports that there existed a "lawyers commission or a law commission of the Communist Party", consisting of "a group of high functionaries of the party to whom had been delegated the formulation * * * of legal strategy for the party"; that "included in that group were Nathan Witt and Harry Sacher"; and that "probably one of those two was the head of it" (R. 36).

Finally, at the time of petitioner's appearance, the committee was satisfied that money had been received by Matusow "out of the treasury [of] the Mine, Mill and Smelter Workers * * * through Nathan Witt and Cameron and Kahn" (R. 34–35).

The reason why petitioner was summoned to testify, according to the committee's counsel, was in

[3] Details of these Communist and Communist-front associations, all of which were in the committee's files, are set forth at R. 25–27 and in the opinion below at Pet. 68.

order to determine "to what extent he participated in the planning for the legal strategy of" the recantations (R. 35).

Thus, as noted by the Court of Appeals (see Pet. 69),—

> * * * when the Subcommittee called appellant as a witness, it had information as to the following: (a) reports linking appellant with the Communist Party; (b) reports linking the Communist Party with a conspiracy to bring about a recantation by Matusow of his testimony against the Communist Party and members thereof; and (c) reports linking appellant with this alleged conspiracy.

Petitioner's testimony at the hearing.—At the hearing, petitioner testified that he first met Matusow two days before the latter took the stand as a witness in support of a motion for a new trial in the *Flynn* case in the United States District Court for the Southern District of New York (R. 44); that he, petitioner, was one of the attorneys in the proceedings on the motion (*ibid.*); that, in connection with those proceedings, Matusow had given him numerous documents (R. 45, 48–48), including a copy of a 75-page report which he had some years previously given to the FBI and other agencies of the Government (R. 45), a diary recording events occurring over a period of several years in the recent past (R. 48), and papers used in the preparation of testimony given by him in a number of cases before the Subversive Activities Control Board (R. 49). Petitioner denied, however, having received from Matusow the affidavit of recantation used in the *Flynn* case (R. 49), denied

having had anything to do with the preparation of the affidavit (R. 50), and denied ever having discussed it with Witt prior to its execution (R. 49–50), but admitted that he may have discussed it with Witt following its execution, during the course of the *Flynn* proceedings, inasmuch as Witt, as counsel for Jencks, was interested in those proceedings (R. 50).

At this point in the proceedings, committee counsel asked petitioner whether he had "ever served a prison sentence" (R. 50). Petitioner asked the committee chairman, Senator McClellan, what the "purpose" of this question was (*ibid.*). In reply to the chairman's query as to the purpose of the question, counsel stated that "among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal Courts", including legislation "which would prohibit members of the Communist Party from practicing law in Federal Courts", and that it was "germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal Courts by persons who are Communists" (R. 50–51). The chairman told counsel he "should lay a foundation for that first by asking the witness if he is a member of the Communist Party" (R. 51). Following a protest by petitioner that such an inquiry into his "political beliefs or associations" seemed to him to be "diversionary in character" (*ibid.*), he was nevertheless asked, and refused to answer, whether he then was or ever had been a member of the Communist Party (R. 52–53)—these being the questions on which counts 1 and

2 of the indictment are based (*supra*, p. 5). At that time he specifically disclaimed reliance on the Fifth Amendment.

The committee counsel thereupon once again asked petitioner whether he had "ever served a prison sentence" (R. 53), petitioner replying on this occasion that he had—a sentence for contempt of court (*ibid.*).

After a series of questions with respect to the petitioner's attendance at the 1950 birthday party for Alexander Bittelman (see *supra*, p. 8), petitioner was asked whether he had "any connection with the legal commission or law commission of the Communist Party" (R. 55). When petitioner replied that he did not "know of any such organization", he was asked whether he then was or ever had been "a member of the Lawyers' Section of the Communist Party" (*ibid.*). This is the question on which count 3 of the indictment is based (*supra*, p. 5). Petitioner replied (R. 55):

> Mr. Chairman, I have declined before and I decline again * * * [o]n the grounds that I have already stated * * *, and I reemphasize that there is nothing in the purposes of the committee or the Congress which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

There followed a colloquy between petitioner and the committee chairman (R. 55–57) in the course of which petitioner made it emphatically clear that he would under no circumstances or conditions answer the pending question or any other question calculated to in-

quire into his "innermost thoughts and beliefs, whether they be on politics, religion or anything else" "on the grounds that it is incompatible with the dignity of the individual to make compulsory disclosure of his thoughts and his ideas and his beliefs" (R. 56; see also R. 57). On being ordered by the chairman to answer the question notwithstanding his objections, petitioner refused (R. 57).

ARGUMENT

1. Petitioner's principal contention (Pet. 24–40) is that the questions which he refused to answer and which form the bases of the three counts of the indictment (see *supra*, p. 5) "were not pertinent to a matter properly under inquiry" (Pet. 24). At no time did he rely on the Fifth Amendment.

"[T]he subject under inquiry"—*i. e.*, the matter of "the Matusow recantation" (R. 51)—"was clearly defined by the subcommittee", states petitioner, "and petitioner was specifically notified as to what that subject was at the time he was subpoenaed" (Pet. 31, citing R. 51). "When the inquiry took a turn into an area seemingly unrelated to the announced subject matter," continues the argument, "he raised the question of pertinency and then was presented with a new subject matter" (Pet. 31)—*i. e.*, the "measure under consideration by the subcommittee barring Communists from practice in the Federal courts" (Pet. 26; see *supra*, p. 10). Petitioner argues that the latter subject was not one which was properly before the committee for the reasons that (1) it was not germane to the committee's "announced investigative

purpose" (*i. e.*, the *Matusow* matter), (2) "[t]he two members of the subcommittee present at the time of petitioner's appearance did not possess the authority to change the subject matter under inquiry", and (3) the newly-announced subject—described by petitioner as proposed legislation "in the area of political qualifications for admission to the Federal bar"—is in any event "beyond the power of Congress" to enact (Pet. 37).

Petitioner concludes that, since an essential element of the offense defined by 2 U. S. C. 192 (*supra*, p. 4) is that the question which the accused is charged with having unlawfully refused to answer be one that is "pertinent to the question under inquiry", his conviction cannot stand (Pet. 24–25).

It is submitted that the argument fails adequately to take into account the facts of record, and that, even assuming, *arguendo*, the invalidity of petitioner's conviction on the first two counts, the assumed defect does not affect his conviction on the third, which suffices to sustain the general sentence which petitioner received (see *supra*, p. 5). *Claassen* v. *United States*, 142 U. S. 140, 146–147; *United States* v. *Trenton Potteries*, 273 U. S. 392, 401–402; cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1.

(*a*) As noted by the court below, it is unnecessary in this case to "reach the question of whether the subcommittee could enlarge the scope of the inquiry" or "the propriety of a line of inquiry concerning practice of law by Communists" (Pet. 74). For, as the court below observed, "[a]ssuming, *arguendo*,

that the subject of practice of law by a Communist Party member was beyond the power and authority of the Subcommittee, the absence of authority to inquire into that area cannot affect the inquiries properly made and pertinent to other authorized subjects being actively pursued by the Subcommittee" (Pet. 74–75). Since, as the court further noted, "[e]arly in the hearing the Subcommittee Chairman notified Sacher that the 'primary purpose of this testimony is to establish a relationship or contact you have had with Mr. Matusow * * *' [see R. 46]", "the question whether Sacher's activities in relation to Matusow and his recantation were purely professional or whether they were motivated by Sacher's involvement in a suspected Communist conspiracy was pertinent to the plainly announced subject of inquiry. There was no abandonment of the 'Matusow Case' inquiry by reason of the brief excursion into discussion of possible legislation relating to law practice" (Pet. 75).

Under this view, which we submit is sound, petitioner's convictions on all three of the counts are valid. The questions involved in all three of the counts relate to membership in the Communist Party, and the question of whether petitioner was a member of the Party was clearly germane to whether he was a party to a "Communist conspiracy" to produce false recantations by Matusow, the basic subject of inquiry.

(*b*) But even if the pertinence of the first two questions could be attacked on the ground that they were asked while the committee was digressing from

the *Matusow* matter to the possibility of legislation relating to law practice, this could in nowise affect the last question, which was the basis for the third count. When the question and refusal on which that count is based took place, the discussion of legislation on law practice had clearly ended. The inquiry had as of that time returned to the subject of the *Matusow* matter (assuming, indeed, contrary to the view of the court below—which we urge is correct—there was even a temporary abandonment of the *Matusow* matter). For, the committee's digression certainly ended when petitioner was asked for the second time (and he this time answered) the question of whether he had "ever served a prison sentence" (*supra,* p. 11)—this having been the question which precipitated the "excursion" in the first place (see *supra,* pp. 10–11). The question on which count 3 is based—whether petitioner was or ever had been a member of the "Lawyers' Section of the Communist Party"—was not asked until some time thereafter (*supra,* p. 11). In the meantime the inquiry had definitely returned to the *Matusow* affair with the series of questions relating to whether petitioner had attended the 1950 Bittleman party (*supra,* p. 11; see R. 54–55).[3] The question which was the basis for count 3 was manifestly germane to the *Matusow* investigation, as the facts related above, *supra,* pp. 5–11, demonstrate.

In short, even assuming, *arguendo,* that the committee's digression was thought to have the effect of rendering invalid petitioner's convictions under

[3] Petitioner concedes that the questions relating to the Bittelman party were germane to the *Matusow* inquiry. He states

the first two counts of the indictment (because the questions underlying those counts were asked in the course of that "excursion"), the third-count conviction is not subject to the same attack because the question and refusal on which it is based indisputably took place after the committee had resumed the main subject of the inquiry, the circumstances surrounding the *Matusow* recantations. This being the case, petitioner's general sentence, being within the limits of the punishment properly imposable under the third count, stands unaffected by petitioner's challenge. See cases cited *supra,* p. 13.

(*c*) Finally, it is perfectly clear from the record (see, especially, *supra,* pp. 11–12) that petitioner's refusals to answer questions relating to his Communist affiliations were absolute and unconditional. He refused "categorically", he told the chairman, to discuss his "political" beliefs (which he equated to answering questions pertaining to his Communist affiliations) because to do so was "inconsistent with the dignity of any man" (R. 52). There was, he said, "*nothing* in

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that "the subcommittee did not, *with a single exception* (R. 25, 54–55), address any questions to petitioner at the hearing concerning the sundry matters which Mr. Sourwine testified were of interest to the subcommittee and constituted a reason for calling him" (Pet. 35, emphasis added). While we deny this statement—among other matters which were testified to by Sourwine as having been of interest to the subcommittee in connection with petitioner's relations with Matusow, and which the committee questioned petitioner about, was the matter of petitioner's visit at the home of Angus Cameron, co-publisher of Matusow's book (see *supra,* p. 8, and R. 57–58)—the "single exception" to which petitioner refers (as evidenced by the record references (R. 25, 54–55) which he supplies, *supra*) is the matter of the Bittelman party.

the purposes of the committee *or the Congress* which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations" (R. 55, emphasis added). It is plain from these and other remarks of petitioner at the hearing (see R. 51–53, 55–57) that petitioner was not basing his refusals to answer on the fact, if it was a fact, that the committee had temporarily departed from the main subject of the inquiry. He did not, in other words, tie his refusals to answer to the fact of the committee's "brief excursion". His refusals were unqualified and unconditional. His present arguments with respect to pertinency are afterthoughts, which have no apparent relation to his conduct at the hearing. There can be no doubt, we submit, of the relevance of the questions respecting petitioner's Communist affiliations to the committee's inquiry into the Matusow affair (see *supra*, pp. 5–11, 13–14).[4] Hence, it is probable that, had petitioner signified to the committee that one of the reasons why he was declining to answer was the fact that (or his belief that) the questions being asked purported to relate to a matter other than the *Matusow* inquiry, the committee chairman would have specifically related the questions to that inquiry. Petitioner, of course, did nothing of the sort. His present efforts to escape punishment on the basis of objections which could have been met if they had been raised at the proper time should therefore fail.

[4] For this reason, there is clearly no warrant for petitioner's assertion that the questions propounded to him at the hearing were designed "for the purpose of doing him injury" (Pet. 59).

2. Petitioner next contends that the indictment is fatally defective on three grounds (Pet. 40–53).

(*a*) The contention (Pet. 42–45) that the indictment is defective for "failure to allege that the question under inquiry was within the subcommittee's delegated authority" (Pet. 42) is made for the first time in this Court, and in any event is without merit. The indictment (R. 2–3) incorporates by reference Senate Resolution 366, 81st Cong., 2d sess. (*supra*, p. 4), the source of the Subcommittee's authority. This was the equivalent of alleging that the subject under inquiry was within the committee's delegated authority. Furthermore, there is manifestly no basis for a claim of prejudice. Hence, under Rule 52 (a), F. R. Crim. P.,[5] the defect (even if one existed) must be disregarded. See also *United States* v. *Debrow*, 346 U. S. 374, 377–8.

(*b*) The contention (Pet. 45–52) that the indictment is fatally defective for "failure to specify the matter under inquiry to which the questions put to petitioner are said to be pertinent" (Pet. 45) was not raised in or passed upon by the Court of Appeals, and is, like the preceding contention, in any event without substance.

Petitioner admitted at the hearing before the committee that he knew and understood that the subject of inquiry was "the Matusow recantation" (R. 51), and the committee chairman informed him, moreover, that "[t]he primary purpose of this testimony is to establish a relationship or contact you have had with

[5] Rule 52 (a) provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Mr. Matusow, whom this committee is investigating * * *'" (R. 46). Petitioner, furthermore, concededly had access before trial to the minutes of the hearing at which the refusals in question took place (R. 79–80), so that any suggestion that he was unaware of what the "matter under inquiry" was would be clearly untenable. Under Rule 52 (a), F. R. Crim. P., therefore (see fn. 5, *supra*, p. 18), the alleged defect, even if one existed, should be disregarded. See also *Hagner* v. *United States*, 285 U. S. 427, 431.

(*c*) Petitioner's final contention with respect to the sufficiency of the indictment (Pet. 52–53)—that it is fatally deficient for "failure to allege that petitioner acted wilfully" (Pet. 52)—is the same in substance as a contention advanced in *Barenblatt* v. *United States*, pending on petition for a writ of certiorari, No. 742, this Term. As we point out in our brief in opposition in that case (pp. 16–17), the indictment does charge that petitioner "unlawfully refused to answer" certain questions (R. 2). For the refusals to have been unlawful, they had to be deliberate. *Quinn* v. *United States*, 349 U. S. 155, 165–166. The intentional character of the refusals was thus implicitly charged. *United States* v. *Deutch*, 235 F. 2d 853 (C. A. D. C.).

3. Also without merit is petitioner's contention (Pet. 53–55) that his conviction violates the "constitutional protections against compulsory disclosures of political affiliation" (Pet. 53).

"If", as the court below wrote, "it is proper, as appellant concedes, to investigate whether there ex-

isted 'a general conspiracy to discredit government informers in the field of Communism,' it was pertinent to question appellant as to his membership and participation in the group believed to have formed the conspiracy" (Pet. 70–71). Particularly is this true where, as here, the particular subject of inquiry is the circumstances surrounding the recantation by a witness, who has appeared in the recent past before the committee conducting the inquiry, of important testimony given by the witness before (among other bodies) the very committee conducting the inquiry.

Petitioner concedes that the exaction by a congressional committee of "disclosures in the area of the First Amendment" is permissible if the compelled disclosures are, "in the context of the hearing, sufficiently connected with the inquiry to justify" them (Pet. 54). This concession is enough, by itself, to dispose of the present contention. For even assuming, *arguendo,* that compulsory disclosure of membership in or affiliation with the Communist Party is a disclosure "in the area of the First Amendment",* the record in this case fully supports the existence of a rational connection between the disclosures which were here sought to be exacted and the subject of the committee's inquiry (see *supra,* pp. 5–11, 13–14).

* See, however, pp. 61–68 of our brief on the merits in *Watkins* v. *United States*, pending on writ of certiorari, No. 261, this Term, where authorities are collected in support of the proposition that a witness before a congressional committee inquiring into some aspect of the subject of Communism in which it has a legitimate interest has no right under the First Amendment to decline to disclose whether he is or has been a member of the Communist Party.

4. It is next argued (Pet. 55–58) that "[t]he resolution establishing the subcommittee"—Senate Resolution 366, 81st Congress (*supra,* p. 4)—is unconstitutional as herein applied because it is "hopelessly vague" (Pet. 55, 56).

Assuming, *arguendo,* that petitioner is correct in his assumption (see Pet. 56) that only the third clause of the resolution is applicable here, his argument is nevertheless without substance. Clause 3 confers on the committee the power to make a "complete and continuing study and investigation" of "(3) the extent, nature, and effects of subversive activities in the United States, * * * including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." Thus, in its context, the phrase "subversive activities" is not, as petitioner argues, left at large so as to provide "no guide" as to "what is being overturned" or subverted, with the result that the resolution is "left without meaningful boundaries" (Pet. 56). The resolution, as recognized by the court below (Pet. 76), is certainly no more general or vague than the resolution establishing the House Committee on Un-American Activities, which authorizes that committee to investigate "(i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from

foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."'[7] And the latter resolution has been repeatedly sustained by the courts as against challenges based on alleged vagueness.[8]

5. Petitioner's final contention is that it was error for the trial court to refuse him a hearing (R. 4–9) for the purpose of determining whether "the votes of Government employees or wives of Government employees were necessary to return the indictment" and, if so, whether the votes of such employees or wives may have been the result of "bias" arising from "a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the Government's request" (Pet. 58). This was not raised in, or passed upon by, the Court of Appeals. The point was thus waived by petitioner.[9]

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[7] H. Res. 5, 79th Cong., 1st sess. (1945) (91 Cong. Rec. 10), subsequently made a standing Rule of the House (Rule XI (1) (q) (2), as amended by the Legislative Reorganization Act of 1946, c. 753, § 121, 60 Stat. 812, 823, 828).

[8] The cases are collected at p. 70 of the Government's brief on the merits in *Watkins* v. *United States*, pending on writ of certiorari, No. 261, this Term. The validity of the House resolution (read together with 2 U. S. C. 192) is among the issues in *Watkins*. The Government's brief in that case, at pp. 71–73, summarizes our arguments on the point.

[9] In any event, the point is without merit. Substantially the same issue was involved but not reached in *Quinn* v. *United States*, 349 U. S. 155 (see *id.* at 170), *Emspak* v. *United States*, 349 U. S. 190 (see *id.* at 202), and *Gold* v. *United States*, 352 U. S. 985, and is likewise involved in *Watkins* v. *United*

CONCLUSION

The case was correctly decided and no conflict of decisions is presented. The case is to be distinguished from *Watkins* v. *United States,* pending on writ of certiorari, No. 261, this Term, and from *Barenblatt* v. *United States,* pending on petition for a writ of certiorari, No. 742, this Term, in that it presents, not the issue of whether the committee in question was acting pursuant to a valid legislative purpose in its general questioning of petitioner (petitioner does not suggest the contrary), but of whether the particular questions which he refused to answer were "pertinent to the question under inquiry", as required by 2 U. S. C. 192. We have pointed out above that they were, and certainly that one of them was, which is all that is necessary to sustain the conviction.

For the reasons given above, it is submitted that the petition for a writ of certiorari should be denied.

In our view, only one issue properly raised herein is, or may be, common to the *Watkins* case—the First Amendment question, discussed at pp. 19–20, *supra.*

States, pending on writ of certiorari, No. 261, this Term. Our *Watkins* brief, p. 75, adopts by reference our arguments on the point as set forth in our *Gold* brief, No. 137, this Term, pp. 123–138, to which, accordingly, we refer the Court for our reply on the merits.

It should be pointed out, furthermore, that, inasmuch as the *fact* of petitioner's refusals to answer is undisputed, the instant case (like *Watkins*, *Quinn*, and *Emspak*) is distinguishable from *Gold* to petitioner's disadvantage. See pp. 75–76 of our *Watkins* brief. An additional distinction, likewise to petitioner's disadvantage, is that, as he concedes, he "was unable to show that more than [eleven] grand jurors were Government employees" (Pet. 58), so that no Government employee's vote was shown to have been necessary to indict.

While we believe petitioner's arguments on this issue to have no merit, the Court may wish to withhold action on the petition until the disposition of the *Watkins* case.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 884

HARRY SACHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO GOVERNMENT'S OPPOSITION

The Government's Opposition Emphasizes the Necessity for Review

The government's Opposition arms our case with new reasons for review. The government acknowledges that only the subcommittee's statement of purpose confining the hearing to an investigation of the credibility of Matusow can justify the pertinency of the questions in issue. It contends that while there might be doubt as to the pertinency of two of the questions involved here, the third question was pertinent to the credibility of Matusow (Opp. 14-15). This contention thus abandons the position of the trial court that the resolution broadly defining the jurisdiction of the subcommittee is the measure of per-

tinency both for the purpose of weighing the admissibility of evidence as well as for the purpose of determining the petitioner's innocence or guilt (R. 70, Pet. 34). Imbedded in this problem is a conflict as to the meaning of the statutory phrase "question under inquiry". Does it mean the entire jurisdiction of a congressional committee, or merely that portion of it which is invoked at the hearing at which the witness appears? Not only were the trial court and the court below in conflict on this point, but the government itself has shifted its position from the broad view which it adopted at the trial (R. 78-79).

Similarly the government now recognizes that the committee's disavowal of its announced subject matter as a basis for pertinency cannot be disregarded. With respect to two of the questions it seems to hesitate to substitute its view for the subcommittee's concerning the basis for pertinency. It urges, however, that the third question was pertinent to the investigation of Matusow's credibility, although the subcommittee itself disavowed the Matusow matter as a reason for asking any of the three questions (Opp. 14-15). The court below found *de novo* that all of the questions in issue were pertinent to the credibility of Matusow and attached no legal consequences to the subcommittee's statement that that was not the reason the questions were asked (Pet. 75). But the theory of the trial court demanded as proof of pertinence only the establishment of the fact that the inquiry was into some form of alleged subversion.

What is the relationship between the justification for pertinency given to a witness at a hearing and that subsequently offered at the trial for contempt? May the committee at the trial offer a justification for pertinency which changes that stated to a witness at a hearing when he seeks a ruling on pertinency? The present answer of the government to this question seems to be an ambiguous "Yes and No". The answer of the court below seems

to be "Yes" (R. 64-70). And, as we have seen, the answer of the trial court is that it makes no difference in a case of this sort what the witness is told at the hearing or what the government proves at the trial, as long as the question is of a certain sort.

What are the rights of a witness who is informed by a committee chairman why a question is pertinent? The answer of the trial court seems to be that the witness must look behind the committee chairman's statement of pertinency to the language of the resolution itself, and if he is misled that is his own misfortune. The answer of the Court of Appeals is that the witness should consider whether the question might be pertinent to the announced matter under inquiry upon a ground not stated to him. The Court of Appeals also thought (Pet. 75) that when a witness indicates by his response to a question which is not pertinent that he might possibly decline to answer the question even if it were pertinent, he "showed his awareness of the risk involved"—whatever that may mean. Thus, according to the lower court, the witness' right to decline to answer questions not pertinent to the matter under inquiry depends upon his demonstrated willingness to answer questions which are pertinent. In a variant of this argument the government now seems to urge that petitioner somewhow either waived the requirement of pertinency or invited error by failing to press his objections with a requisite degree of vigor.

The government's response to our contentions with respect to the First Amendment really amounts to a reaffirmation of what may be called the "man on the street" formula which has grounded a host of convictions in the district court (see Appendix C). This formula asserts the legislative power to force anyone at random to make compulsory disclosure of whether he is or was a Communist or has had subversive associations. The legislative justification need at most be nominal.

Although the government makes various responses to our contentions with respect to the insufficiency of the indictment, it nowhere troubles to explain the anomaly which gives an individual charged under Section 192 in the Southern District of New York a reasonably informative indictment and a defendant in the District of Columbia, charged with the same offense, a loosely drawn and misleading one.

The issues which the government's Opposition has thus sharpened are common to a number of other cases. They should be authoritatively resolved for the guidance of the trial and appellate courts in the District of Columbia.*

Reply On the Issues of Pertinency

The government apparently concedes the validity of our contention that petitioner was erroneously convicted if all three of the questions in issue were deemed by the committee to be pertinent only to the subject matter of qualifications of lawyers. There is no answer at all to our contention that the inquiry into the credibility of Matusow could not legally be altered by the two members of the subcommittee who were present at the time of petitioner's appearance.

The government argues that all three questions were pertinent because they all "relate to membership in the Communist Party" and that issue was "clearly germane" to whether there was a Communist conspiracy to produce false recantations (Opp. 14). The difficulty with this argument, of course, is that the subcommittee chairman himself told the witness (Pet. 26; R. 51), in response to his request for a ruling on pertinency, that the questions were not germane to the announced subject matter.

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* See Petitioner, Appendix C and the two most recently reported cases, *United States* v. *Shelton*, 148 F. Supp. 926 (D. C. D. C.) and *United States* v. *Knowles*, 148 F. Supp. 832 (D. C. D. C.).

The government, apparently recognizing the difficulty involved in substituting its views on pertinency for the subcommittee's, seeks escape through the theory that even if the first two questions were not pertinent to the announced subject matter, the third question—relating to membership in the Lawyers' Section of the Communist Party—was pertinent. This theory is based upon the contention that the first two questions alone were asked in the course of a brief "excursion" into the unauthorized subject matter of political qualifications for lawyers (Opp. 15-16). According to the government, the third question was asked after the "excursion" had ended.

But, as the government itself concedes (Opp. 14), all three questions are unified by the same subject matter. They were all part of a single line of inquiry.* And the subcommittee's disavowal of the Matusow investigation as a ground for pertinency can only be read to apply to the entire line of inquiry.

The government contends (Opp. 13) that when petitioner was asked a second time (R. 50-53) whether he had ever served a prison sentence the subcommittee's "brief excursion", which had been launched when the question was initially asked, was ended and the inquiry reverted to an investigation of Matusow's credibility. But the record cannot be balkanized in this way. The record unambiguously falls into two quite distinct parts. The first portion deals with an exploration of petitioner's relationship to Matusow (R. 46-50). *This exploration was terminated after a series of questions dealing with petitioner's relationship to the Matusow matter* (R. 50). The committee then proceeded to investigate a wholly different subject matter for which it gave a wholly new justification. This new investigation and justification were never

* The cases are collected in *United States* v. *Emspak* (and nineteen others), 95 F. Supp. 1012 (D. C. D. C.).

abandoned or changed; there was no reversion to the Matusow inquiry.

The government's "excursion" theory is refuted not only by the record as a whole, but by each specific question which the subcommittee asked. The question about serving a prison sentence for contempt dealing as it does with sanctions against lawyers, on its face relates to the matter of qualifications to practice. When the question was originally asked (R. 50), Chairman McClellan signified both to the witness and to counsel for the subcommittee that it was not pertinent to the inquiry concerning Matusow's credibility. How could asking it twice make it more pertinent?

There is even less merit in the government's suggestion (Opp. 15), that if the prison question did not do so, the question whether petitioner had attended a birthday party in 1950 for one Alex Bittelman "definitely" restored the inquiry to the petitioner's complicity in the Matusow recantation of 1955. Manifestly the question about attendance at the birthday party in 1950 was in pursuance of an inquiry into petitioner's alleged past subversive associations which the committee itself thought beyond the scope of the Matusow inquiry.

Equally far-fetched is the government's statement (Opp. 15, ftn. 3) that the Petition concedes that the Bittelman question marked a reversion to the Matusow inquiry. In our Petition (at 35), we point to the fact that Mr. Sourwine at the trial gave many reasons for calling petitioner which were not mentioned at the hearing, and that one reason which is reflected both in the hearing and trial records was the attendance at the birthday party. The government argues as follows:

(a) the subcommittee asked about the Bittelman birthday party in 1950;

(b) Mr. Sourwine testified at the trial that the subcommittee was interested in petitioner's attendance at the Bittelman birthday party in 1950;

(c) the Petition recites "a" and "b".

Therefore petitioner has "conceded that the questions relating to the Bittelman party were germane to the Matusow inquiry."!

While the government strains mightily at so many straws to develop an argument that the answer to the question about the Lawyers' Section of the Community Party was demanded of the witness for a reason other than that for which the two preceding political questions were asked, it wholly disregards the specific ruling of the chairman on this point. When petitioner expressly challenged the pertinence of this very question (R. 55), did the chairman say that the inquiry into the qualifications for lawyers had ended some time earlier? Did he say that while he had found that the previous two question were not pertinent, he now "was certain what the purpose was" (R. 51) with relationship to the Matusow inquiry? Here is what he said (R. 55):

> "But when we come to the security of our country, an organization that is dedicated obviously to subversive purposes as an objective, I think it becomes the duty of the Congress of the United States and al-o the duty of the executive branch of the Government to try to ferret these things out and expose them if they relate directly to the national security—associations, at some time, and the knowledge of them, may help the Congress or help other officials of the Government to preserve national security. For that reason the Chair thinks that the question is proper and directs you to answer it."

Essaying still another tack (Opp. 17), the government urges that petitioner did not state that his refusals to an-

swer resulted from his belief that the questions in issue were not pertinent. But he is not required so to state.* In any event, petitioner did decline to answer each and all of the questions on the ground of the First Amendment and upon the further ground that (R. 52) "an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may be properly made of me." And the specific question which the government now seeks to isolate from the rest of the inquiry, petitioner declined to answer (R. 55) "on the grounds I have already stated * * *."

Of a piece with the preceding argument is one that the questions were really pertinent and that if petitioner had indicated that lack of pertinency was one of the reasons for his refusal (Opp. 17), "it is probable that * * * the committee chairman would have specifically related the questions to that [Matusow inquiry]." This contention is not only groundless legally, but is factually mystifying. As we have seen, *supra*, when petitioner indicated that one of his reasons for declining to answer was his doubt as to pertinency, the committee did not relate the questions to the Matusow inquiry—"specifically" or otherwise.

What the government is really contending is that the committee was mistaken when it told petitioner the reason

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* See, for example, *Bowers* v. *United States*, 202 F. 2d 447, 452 (App. D. C.):

> "It may be suggested that, when Bowers was being examined before the subcommittee, he did not assign lack of pertinency as his reason for refusing to answer the seven questions, and so waived that defect. The answer to such a suggestion is that the right to refuse to answer a question which is not pertinent is not a personal privilege, such as the right to refrain from self-crimination, which is waived if not seasonably asserted; but that pertinency is an element of the criminal offense which must be shown by the prosecution."

why it demanded answers and that the petitioner was somehow at fault in failing to set the committee straight. But petitioner was under no duty to quarrel with the committee's statement of purpose, and the government cannot reject such a statement on the ground that it is "probable" that it "would have" been changed in a way more congenial to its present theory.* In *Watkins*, the government reminded the court over and over again that courts "should not go beyond the reasons officially given for conducting an inquiry thought necessary as preliminary to the passage of legislation" (Watkins Brief, p. 46; see, also, pp. 40-42, 47-48, 53). Surely the executive cannot ask the courts to pay a greater deference to the congressional judgment than it is willing to pay itself.

Reply on the First Amendment Issues

We do not agree with the government (Opp. 20) that the fact that the subcommittee was investigating the credibility of a witness who had appeared before it three years earlier supplies a greater justification for invading petitioner's rights under the First Amendment than in the case of an inquiry to gather facts for the purpose of passing a law.

The investigation by a congressional committee into the credibility of a witness is an aspect of the congressional jurisdiction to protect the integrity of its own processes. This power has a quasi-judicial resonance. It is precisely this aspect of the power of compulsory process which is subject to the limitation of "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *Marshall* v. *Gordon*, 243 U. S. 521, 541; and see

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* Apparently the government thinks that proof of "probable" violation of the contempt statute meets the standard of the criminal law. Review should be granted to eliminate this theory from the administration of the contempt statute (Pet. 59-60).

the Government Brief in *Watkins*, at pp. 52-53.* But wholly apart from the nature of the congressional jurisdiction exerted here is the fact that none of the lower courts applied the standards of adjudication which are appropriate to constitutional cases. And our answer to the government's suggestion (Opp. 20) that the questions in issue were rationally connected with the matter under inquiry, is first that the committee itself did not think that they were, second, that the tortured defense of their pertinency itself makes this more than doubtful, and third, that if the First Amendment is to have meaning in this area, there must be a pressing, legislative need for the information involved, before a witness can be deprived of a basic right by which we live as a people.

Reply to Contentions With Respect to the Insufficiency of the Indictment

All our contentions concerning the insufficiency of the indictment are embraced within the broadly phrased motion to dismiss (R. 3). Those contentions which were not raised in the Court of Appeals were not waived, where, as here, the prejudicial injury to the defense is manifest (Pet. 45, 48). See *Hagner* v. *United States*, 285 U. S. 427; *Butzman* v. *United States*, 205 F. 2d 343, 348 (C. A. 6); *Gariepy* v. *United States*, 189 F. 2d 459 (C. A. 6); *Risken* v. *United States*, 197 F. 2d 959 (C. A. 8).

A reference in the indictment to Senate Resolution 366 patently fails to allege, contrary to the government's con-

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* The government seeks to stress the importance of the investigation by stating that Matusow had "appeared in the recent past before the subcommittee" (Opp. 20). Actually, as the government Opposition itself recites (at 5), Matusow had appeared as a witness in 1952, some three years prior to his recantation. Besides, Matusow's testimony about the Smelter Workers' Union which was allegedly being probed (R. 99-100) had already produced legislative issue in Section 10 of the Communist Control Act of 1954 (68 Stat. 778; Subversive Activities Control Act, Section 13A).

tention (Opp. 18), that the particular question under inquiry was within the subcommittee's delegated authority.* And we are at a loss to understand how the government can urge (Opp. 18-19), that petitioner was not prejudiced by the lack of an allegation of the subject matter under inquiry when the trial court itself, following the line of the indictment, made the resolution, and not the matter under inquiry, the test of pertinency. How could petitioner have been more prejudiced?

Reply On the Issue of Vagueness of the Indictment

In both *Watkins* and *Emspak*, the government contended that the possible vagueness of the resolution creating the House Un-American Activities Committee was redeemed by the specificity of the matter under inquiry (Pet. 32). The instant resolution is even more vague than the House Committee Resolution (Pet. 57-58), and as the government's "brief excursion" theory describes the manner in which the matter under inquiry mysteriously disappears and reemerges, it could hardly impose constitutionally definite contours upon the resolution.

Reply On the Issues of a Fair and Impartial Grand Jury

The government's brief response to our contention concerning the composition of the grand jury rests upon two errors. In the first place, this point was raised in the

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* Indeed the government never established the subcommittee's authority by delegation from the Judiciary Committee. It offered a resolution of the Judiciary Committee (GE 2, pp. 82-83), purporting to continue some prior action, but this resolution does not purport to show the scope of the original delegation of authority. The record is thus utterly silent on the subject of the initial delegation of authority to the subcommittee.

Court of Appeals and was not waived.* In the second place, the Grand Jury had to decide whether petitioner wilfully refused to answer a question pertinent to a matter then under inquiry. This was hardly a purely ministerial disposition of an undisputed fact, as the government's own struggles with the problem of pertinency so graphically demonstrate.

Respectfully submitted,

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* Petitioner's brief below states (at p. 13, footnote 6):

"This Court has decided the issue of the qualifications of government employees to sit on a grand jury in a case charging contempt of Congress, contrary to the contentions of the appellant. *Emspak* v. *United States*, 91 App. D. C. 378, 203 F. 2d 54. The issue, however, has never been passed upon by the Supreme Court, *Quinn* v. *United States*, 349 U. S. 155, 170. Accordingly, while saving this point, we do not brief it herein."